

May 1, 2009

**OFFICE OF THE HEARING EXAMINER
KING COUNTY, WASHINGTON**

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REPORT AND RECOMMENDATION TO THE METROPOLITAN KING COUNTY COUNCIL

SUBJECT: Department of Natural Resources & Parks (DNRP), Water and Land Resources Division,
file no. **E08CT103**
Proposed Ordinance No. **2009-0050**

Open Space Taxation (Public Benefit Rating System; PBRS)

Application of

JAMES & ELIZABETH DORAN

28510 NE Cherry Valley Road
Duvall, Washington 98019

Location of Property: 28510 NE Cherry Valley Road
Duvall, Washington

SUMMARY OF RECOMMENDATIONS:

Department's Preliminary:	Approve 12.35 acres for 50% of market value (contingent)
Department's Final:	Approve 12.35 acres for 50% of market value (contingent)
Examiner:	Approve 12.35 acres for 50% of market value (contingent)

PRELIMINARY REPORT:

The Department of Natural Resources & Parks, Water and Land Resources Division Report on item no. E08CT103 was received by the Examiner on February 20, 2009.

PUBLIC HEARING:

After reviewing the report and examining available information on file with the application, the Examiner conducted a public hearing on the application as follows:

The hearing on item no. E08CT103 was opened by the Examiner on March 4, 2009, in the Hearing Examiner's Conference Room, 400 Yesler Way, Room 404, Seattle, Washington, and was continued to April 15, 2009, to allow the Applicant time for further research into the legal effect of an onsite Native Growth Retention Area (NGRA) on the PBRS qualification of the property, and possible lifting of the NGRA. The hearing was closed on April 15, 2009.

Participants at the public hearing and the exhibits offered and entered are listed in the attached minutes. A verbatim recording of the hearing is available in the office of the King County Hearing Examiner.

FINDINGS, CONCLUSIONS & RECOMMENDATION: Having reviewed the record in this matter, the Examiner now makes and enters the following:

FINDINGS:

1. General Information:

Owner:	James & Elizabeth Doran
Location:	28510 NE Cherry Valley Road, Duvall
PBRS categories requested:	Open space resources Buffer to public land Rural open space Scenic resource, viewpoint or view corridor Significant plant site Significant wildlife or salmonid habitat Surface water quality buffer Watershed protection area Bonus categories Resource restoration
Categories recommended:	Open space resources Watershed protection area (contingent) Bonus categories Resource restoration (contingent)
STR:	SE 07-26-07
Zoning:	A-35
Parcel no.:	072607-9016
Total acreage:	14.30 acres
Recommended PBRS:	12.35 acres

(The land area recommended for PBRS enrollment is the entire parcel less the excluded area, which is what has been calculated by DNRP. In the event the County Assessor's official parcel size is revised, the PBRS acreage shall be administratively adjusted to reflect that change.)

2. The subject property is currently enrolled in the farm and agriculture open space program. Timely application was made to King County for PBRS current use valuation of the property to begin in 2010. Notice of the application was given as required by law.

3. Except as modified herein, the facts set forth in the King County Department of Natural Resources & Parks (DNRP), Water and Land Resources Division, Preliminary Report and testimony for the May 4, 2009, public hearing are found correct and are incorporated herein by reference. Copies of the department report will be provided with the copies of this report submitted to the Metropolitan King County Council.
4. The roughly northern 10.75 acres, approximately, of the property (see map, exhibit no. 9) are encumbered by a Forested Open Space and Native Growth Retention Area (NGRA) covenant executed by Applicant James Doran on December 21, 2004 and recorded with the County on January 25, 2005 under recording no. 20050125000707. The covenant is recited on a form with the letterhead of the County Department of Development and Environmental Services (DDes) and is entitled “1998 KCSWDM Forested Open Space and Native Growth Retention Area Form.” (“KCSWDM” is the abbreviation of the King County Surface Water Design Manual, the County’s drainage standards and procedures adopted pursuant to Chapter 9.04 KCC. “1998” refers to the edition of the KCSWDM in effect at the time the covenant was executed.)
5. In executing the covenant, Mr. Doran as Grantor declares in part that “in consideration of” building permit approval B04L1627, the area encumbered by the covenant is “hereby established as having a native growth retention area for the purpose of dispersing and treating stormwater flows and is subject to restrictions applying to vegetation removal,” and that the NGRA “shall be maintained in a forested condition with the exception of open water and existing non-forested native wetland plant communities” with very limited exceptions: removal of noxious weeds and non-native vegetation with replacement by native vegetation; construction of private trails to certain standards; limited vegetation trimming for views; replacement of individual trees with native trees on a limited basis; and timber harvest pursuant to an approved forest management plan and necessary permits.
6. General rural area clearing limits set forth in KCC 16.82.150 and .152,¹ parts of the county grading code (Chapter 16.82 KCC), have been invalidated by the Court of Appeals. On March 3, 2009, the Washington Supreme Court declined to review the Court of Appeals ruling. [*Citizens’ Alliance for Property Rights (CAPR) v. Sims*, Court of Appeals No. 59416-8-I]
7. Mr. Doran contends that the *CAPR* ruling acted to invalidate the NGRA on the Doran property. The argument is unpersuasive, as it is based on a misconception of the breadth of *CAPR*’s effect. The *CAPR* opinion acted only to invalidate the rural clearing limits imposed by the cited regulations in the grading ordinance, KCC 16.82.150 and .152. It did not have the legal effect of invalidating other forms of clearing restrictions or vegetation retention requirements such as those encumbering the Doran property via the NGRA. Those are wholly separate matters unaffected by *CAPR*. As noted, the NGRA was established on the Doran property by a recorded covenant; it is not an area whose clearing was regulated solely by the now invalidated KCC 16.82.150 and .152.
8. In summary, the court invalidation of KCC 16.82.150 and .152 in *CAPR* does not have the effect Mr. Doran desires; the NGRA on the Doran property has not been legally invalidated by such court action.

¹ KCC 16.82.150 in particular this case; .152 applies to subdivision activity.

9. Because it was established for development drainage purposes in consideration of a building permit, the NGRA on the Doran property constitutes an “open space area[] required as part of a development.” [KCC 20.36.190.E.3] As such, it is “not eligible for open space classification...unless the owner provides further public benefit, such as additional open space not restricted or required by applicable regulation, or resource restoration. Dedicated open space, such as a privately owned open space tract or native growth retention/detention area, is eligible for participation only if additional acreage, acceptable to the department, featuring a plant community where native plants are dominant, is provided.” [KCC 20.36.190.E]
10. Accordingly, the Doran property is ineligible for PBRs enrollment unless “additional acreage, acceptable to the Department, featuring a plant community *where native plants are dominant*, is provided.” (Emphasis added) Because there are no areas on the property outside the NGRA which are natively vegetated to any significant degree, DNRP has concluded that restoration of an area outside the NGRA to native vegetation is required for qualification, and in this case such area must be at least 1.60 acres (to provide the 15 percent of area additional to the calculated base native vegetation area²) to qualify for award under the watershed protection area (and thus for PBRs enrollment in general). The restoration must occur under the auspices of a resource restoration plan reviewed and approved by the County, which would result in award also under the resource restoration bonus category. This recommendation provides for such occurrence on a contingent basis, should the Applicant desire to pursue it. (It is apparent that it will necessarily involve some front-end costs to provide the native vegetation restoration.)
11. Award of credit under the watershed protection area category is contingent on award under the resource restoration bonus category and restoring/replanting with native vegetation of 1.60 acres or more of the property which are currently not natively vegetated. Failure to qualify under this category would preclude the property from enrollment in the PBRs program at present due to lack of eligibility under any other basic open space resource categories.
12. Award of credit under the resource restoration bonus category is contingent upon Applicant submission of a resource restoration plan by August 1, 2009, its subsequent DNRP approval by September 1, 2009, and concurrent award under the watershed protection area category. The restoration plan must address the restoration of a minimum of 1.60 acres outside of the NGRA.
13. In a separate approach, Mr. Doran seeks award credit for his property by virtue of a proposed alternative qualification, his good works in participation in salmon recovery efforts in neighboring offsite areas. While certainly laudable, such efforts do not qualify for award points under the specific criteria of the PBRs program. There are no provisions in the program for alternative qualification.

² Award under the watershed protection area category is given if “the enrolling forested area...consist[s] of an additional fifteen percent of forest cover beyond that required by county...regulation.” [KCC 20.36.100.A.20] The property has not been shown to qualify by providing forest cover substantially in excess of currently effective regulations. Nevertheless, award should continue to be granted based on the clearing limits of KCC 16.82.150 effective prior to their invalidation. Even though that regulatory basis of award consideration has been undercut by the invalidation, the established award structure was in part predicated on its effectiveness, and the policy principle behind the award structure remains and should be respected as intended. The principle is that forest cover is valuable for watershed protection and is eligible for PBRs award if its area is substantially (at least 15 percent) over and above the base expressed as the minimum value, whether expressed by the prior regulation or by any regulations which are currently effective.

14. Subject to the above-noted contingencies, the property contains priority open space resources and is eligible for a total award of 10 points under the King County Public Benefit Rating System. The resulting current use valuation therefore would be 50% of market value for 12.35 acres of the property.

CONCLUSION:

1. Subject to the above-noted contingencies, approval of current use valuation of 50% of market value for 12.35 acres of the property pursuant to the Public Benefit Rating System adopted by Chapter 20.36 KCC would be consistent with the purposes and intent of King County to maintain, preserve, conserve and otherwise continue in existence adequate open space lands and to assure the use and enjoyment of natural resources and scenic beauty for the economic and social well-being of King County and its citizens.

RECOMMENDATION:

APPROVE current use valuation of 50% of market value for 12.35 acres of the property, subject to the conditions recommended in the Department of Natural Resources & Parks report for the May 4, 2009 public hearing and the above-noted contingencies.

Current use valuation shall be subject to all terms and conditions of RCW Chapter 84.34 and KCC Chapter 20.36, as may be amended from time to time, and all regulations and rules duly adopted to implement state law and county ordinances pertaining to current use valuation.

RECOMMENDED May 1, 2009.

Peter T. Donahue
King County Hearing Examiner

NOTICE OF RIGHT TO APPEAL AND ADDITIONAL ACTION REQUIRED

In order to appeal the recommendation of the Examiner, written notice of appeal must be filed with the Clerk of the King County Council with a fee of \$250.00 (check payable to King County Office of Finance) ***on or before May 15, 2009***. If a notice of appeal is filed, the original and 6 copies of a written appeal statement specifying the basis for the appeal and argument in support of the appeal must be filed with the Clerk of the King County Council ***on or before May 22, 2009***. Appeal statements may refer only to facts contained in the hearing record; new facts may not be presented on appeal.

Filing requires actual delivery to the Office of the Clerk of the Council, Room 1025, King County Courthouse, 516 3rd Avenue, Seattle, Washington 98104, prior to the close of business (4:30 p.m.) on the date due. Prior mailing is not sufficient if actual receipt by the Clerk does not occur within the

applicable time period. The Examiner does not have authority to extend the time period unless the Office of the Clerk is not open on the specified closing date, in which event delivery prior to the close of business on the next business day is sufficient to meet the filing requirement.

If a written notice of appeal and filing fee are not filed within 14 days calendar days of the date of this report, or if a written appeal statement and argument are not filed within 21 calendar days of the date of this report, the Clerk of the Council shall place a proposed ordinance which implements the Examiner's recommended action on the agenda of the next available Council meeting. At that meeting, the Council may adopt the Examiner's recommendation, may defer action, may refer the matter to a Council committee, or may remand to the Examiner for further hearing or further consideration.

Action of the Council is final. The action of the Council on a recommendation of the Examiner shall be final and conclusive unless within twenty-one (21) days from the date of the action an aggrieved party or person applies for a writ of certiorari from the Superior Court in and for the County of King, State of Washington, for the purpose of review of the action taken.

MINUTES OF THE MARCH 4 AND APRIL 15, 2009, PUBLIC HEARINGS ON DEPARTMENT OF NATURAL RESOURCES & PARKS FILE NO. E08CT103:

Peter T. Donahue was the Hearing Examiner in this matter. Participating in the hearing were Bill Bernstein representing the Department and Applicant James Doran. There were no other participants in this hearing.

The following exhibits were offered and entered into the hearing record:

- Exhibit No. 1 *Not submitted*
- Exhibit No. 2 *Not submitted*
- Exhibit No. 3 *Not submitted*
- Exhibit No. 4 DNRP Preliminary Report to the Hearing Examiner
- Exhibit No. 5 Affidavit of Publication
- Exhibit No. 6 Notice of hearing from the Hearing Examiner's Office
- Exhibit No. 7 Notice of hearing from the PBRS/Timber program
- Exhibit No. 8 Legal notice and introductory ordinance to County Council
- Exhibit No. 9 Application signed/notarized
- Exhibit No. 10 Assessor's map
- Exhibit No. 11 King County Assessor's database printout
- Exhibit No. 12 Arcview and orthophoto/aerial map
- Exhibit No. 13 Letter to neighbors re: notification of PBRS application
- Exhibit No. 14 Letter to applicant re: received application and approval schedule
- Exhibit No. 15 *Reserved for future submission of Restoration Plan*
- Exhibit No. 16 *Reserved for future submission of legal description of area to be enrolled*
- Exhibit No. 17 Email chain re: request for postponement and category qualification
- Exhibit No. 18 DDES Q&A sheet regarding court rulings on King County clearing limits

This document is provided for information only. DO NOT complete and return. A completed copy will be furnished to the Applicant(s) by the Office of the Hearing Examiner after the application has been approved by the Metropolitan King County Council.

OPEN SPACE TAXATION AGREEMENT

Chapter 84.34 RCW

(To be used for "Open Space", "Timber Land" Classification or "Reclassification" Only)

Property Owner: **XXX**
Property Address: **XXX**
Granting Authority: **King County, Washington**
Legal Description

Assessor's Property Tax Parcel or Account Number: **XXX**
Department of Natural Resources & Parks File Number: **E0XCTXXX**
This agreement is between **XXX** hereinafter called the "Owner", and
King County, Washington hereinafter called the "Granting Authority".

Whereas the owner of the above described real property having made application for classification of that property under the provisions of Chapter 84.34 RCW. And whereas, both the owner and granting authority agree to limit the use of said property, recognizing that such land has substantial public value as open space and that the preservation of such land constitutes an important physical, social, esthetic, and economic asset to the public, and both parties agree that the classification of the property during the life of this agreement shall be for:

Open Space Land/Timber Land

Now, therefore, the parties, in consideration of the mutual covenants and conditions set forth herein, do agree as follows:

1. During the term of this agreement, the land shall be used only in accordance with the preservation of its classified use.
2. No structures shall be erected upon such land except those directly related to, and compatible with, the classified use of the land.
3. This agreement shall be effective commencing on the date the legislative body receives the signed agreement from the property owner and shall remain in effect until the property is withdrawn or removed from classification.
4. This agreement shall apply to the parcels of land described herein and shall be binding upon the heirs, successors and assignees of the parties hereto.
5. The landowner may withdraw from this agreement if, after a period of eight years, he or she files a request to **withdraw** classification with the assessor. Two years from the date of that request the assessor shall withdraw classification from the land, and the applicable taxes and interest shall be imposed as provided in RCW 84.34.070 and 84.34.108.
6. After the effective date of this agreement, any change in use of the land, except through compliance with items (5), (7), or (9), shall be considered a **breach** of this agreement, and shall be subject to removal of classification and liable for applicable taxes, penalties, and interest as provided in RCW 84.34.080 and RCW 84.34.108.
7. A **breach** of agreement shall not have occurred and the additional tax shall not be imposed if removal of classification resulted solely from:
 - a) Transfer to a governmental entity in exchange for other land located within the State of Washington.
 - b) A taking through the exercise of the power of eminent domain, or sale or transfer to an entity having the power in anticipation of the exercise of such power and having manifested its intent in writing or by other official action.
 - c) A natural disaster such as a flood, windstorm, earthquake, or other such calamity rather than by virtue of the act of the land owner changing the use of such property.
 - d) Official action by an agency of the State of Washington or by the county or city where the land is located disallowing the present use of such land.
 - e) Transfer of land to a church when such land would qualify for exemption pursuant to RCW 84.36.020.
 - f) Acquisition of property interests by State agencies or agencies or organizations qualified under RCW 84.34.210 and 64.04.130 (see RCW 84.34.108(6)(f)).

- g) Removal of land classified as farm and agricultural land under RCW 84.34.020(2)(e).
 - h) Removal of land from classification after enactment of a statutory exemption that qualifies the land for exemption and receipt of notice from the owner to remove the land from classification.
 - i) The creation, sale, or transfer of forestry riparian easements under RCW 76.13.120.
 - j) The creation, sale, or transfer of a fee interest or a conservation easement for the riparian open space program under RCW 76.09.040.
 - k) The sale or transfer of land within two years after the death of the owner of at least a fifty percent interest in the land if the land has been assessed and valued as forest land under chapter 84.33 RCW, or under chapter 84.34 RCW continuously since 1993. The date of death shown on the death certificate is the date used.
8. The county assessor may require an owner to submit data relevant to continuing the eligibility of any parcel of land described in this agreement.
 9. The owner may apply for reclassification as provided in Chapter 84.34 RCW.
 10. This agreement shall supersede any previous open space taxation agreement entered into for the subject property.

This agreement shall be subject to the following conditions:

See attached Hearing Examiner Report and Recommendation

It is declared that this agreement specifies the classification and conditions as provided for in Chapter 84.34 RCW and the conditions imposed by this Granting Authority. This agreement to tax according to the use of the property is not a contract and can be annulled or canceled at any time by the Legislature (RCW 84.34.070).

Granting Authority:

Dated _____

_____ King County, Washington

Council Chair

As owner(s) of the herein-described land I/we indicated by my/our signature(s) that I am/we are aware of the potential tax liability and hereby accept the classification and conditions of this agreement (must be signed by all owners).

Print Name

Signature

Date signed agreement received by Legislative Authority _____

For tax assistance, visit <http://dor.wa.gov> or call 1-800-647-7706. To inquire about the availability of this document in an alternate format for the visually impaired, please call (360) 705-6715. Teletype (TTY) users may call 1-800-451-7985.
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